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WORKMEN'S COMPENSATION ACT: SERIOUS AND WILFUL MISCONDUCT OF EMPLOYER—The provision¹ of the Workmen's Compensation Act² which increases compensation one half when the injury is caused by the "serious and wilful misconduct of the employer" has been construed for the first time³ in *Horst Company v. Industrial Accident Commission*,⁴ but a number of cases⁵ have arisen involving the section⁶ of the act which gives to the employer a right to have the compensation reduced one half in case of "serious and wilful misconduct" on the part of the employee. Cases have also arisen under the provision,⁷ since repealed, of the act of 1913 which entitled the employee to disregard the act and sue for damages when the injury was caused by the employer's gross negligence or wilful misconduct.⁸ Workmen's compensation acts in several jurisdictions⁹ have provisions similar to the one construed in the principal case, and a few acts penalize the employer who

¹ Cal. Stats. 1917, ch. 586, § 6(b) as amended by Cal. Stats. 1919, ch. 471.

² Cal. Stats. 1913, ch. 176; Cal. Stats. 1915, ch. 541, 607, 762; Cal. Stats. 1917, ch. 586; Cal. Stats. 1919, ch. 471.

³ The Industrial Accident Commission, however, has construed this provision in the following cases from which no appeals were taken: *Davis v. Craig Shipbuilding Co.* (1918) 5 Cal. Ind. Acc. Com. Dec. 118; *Butt v. Hampton Co.* (1918) 5 Cal. Ind. Acc. Com. Dec. 159; *Burke v. Chandler Shipbuilding Co.* (1919) 5 Cal. Ind. Acc. Com. Dec. 237.

⁴ (Oct. 20, 1920) 60 Cal. Dec. 482, 193 Pac. 105. Rehearing denied Nov. 18, 1920..

⁵ In the following cases it was held that the employee was guilty of "serious and wilful misconduct": *Great Western Power Co. v. Pillsbury* (1915) 171 Cal. 180, 149 Pac. 35; *Fidelity and Deposit Co. v. Ind. Acc. Com.* (1916) 171 Cal. 728, 154 Pac. 834, L. R. A. 1916D 903; *Pacific Coast Casualty Co. v. Ind. Acc. Com.* (1918) 36 Cal. App. 547, 172 Pac. 1128; *McAdoo v. Co. v. Ind. Acc. Com.* (1916) 31 Cal. App. 701, 162 Pac. 1041; *Diestelhorst v. Ind. Acc. Com.* (1917) 32 Cal. App. 771, 164 Pac. 44; *Bay Shore Laundry Ind. Acc. Com.* (1919) 28 Cal. App. Dec. 817. In the following cases the employees were exonerated: *Brooklyn Mining Co. v. Ind. Acc. Com.* (1916) 172 Cal. 774, 159 Pac. 162; *Shafter Estate Co. v. Ind. Acc. Com.* (1917) 175 Cal. 522, 166 Pac. 24; *Gray v. Ind. Acc. Com.* (1917) 34 Cal. App. 713, 168 Pac. 702; *Great Western Electro-Chemical Co. v. Ind. Acc. Com.* (1917) 35 Cal. App. 450, 170 Pac. 165; *U. S. Fidelity and Guarantee Co. v. Ind. Acc. Com.* (1917) 174 Cal. 616, 163 Pac. 1013; *North Pacific Steamship Co. v. Ind. Acc. Com.* (1917) 174 Cal. 500, 163 Pac. 910; *Maryland Casualty Co. v. Ind. Acc. Com.* (1918) 27 Cal. App. Dec. 886, 178 Pac. 542; *Rosedale Cemetery Assn. v. Ind. Acc. Com.* (1918) 37 Cal. App. 706, 174 Pac. 351; *Western Pacific R. R. Co. v. Ind. Acc. Com.* (1919) 57 Cal. Dec. 500, 181 Pac. 787; *Hyman Bros. Box etc. Co. v. Ind. Acc. Com.* (1919) 57 Cal. Dec. 496, 181 Pac. 784.

⁶ Cal. Stats. 1917, ch. 586, § 6 (a) (4) as amended by Cal. Stats. 1919, ch. 471.

⁷ Cal. Stats. 1913, ch. 176, § 12 (b).

⁸ *Helme v. Great Western Milling Co.* (1919) 30 Cal. App. Dec. 84, 185 Pac. 510; *Schmidt v. Purcell* (1920) 32 Cal. App. Dec. 199, 190 Pac. 846.

⁹ Md. Acts 1914, ch 800 as amended; Ind. Laws 1915, ch. 106, § 8; Mich. P. A. 1st Ex. Sess. 1912, Act No. 10, p. 20, as amended; Great Britain, Act of 1906 (6 Edw. VII, ch. 58) § 1 (c); West Va. Acts 1913, ch. 10, § 28, as amended; U. S. Act Sept. 7, 1916, ch. 458, § 1; 39 Stat. 742.

injures the employee with "deliberate intention,"¹⁰ but apparently none but the Massachusetts act¹¹ contains provisions similar to those of the present California act with regard both to the employer and to the employee. The principal case and the Massachusetts cases¹² indicate that the seriousness and wilfulness of the employer's misconduct is to be judged by the same standards as applied to the employee.

In the principal case it was held upon the authority of *Fidelity and Deposit Company of Maryland v. Industrial Accident Commission*¹³ that an employer's failure to protect the shafting in which an employee's hair was caught, with the result that she was scalped, was serious and wilful misconduct since the omission to take the proper precaution was in violation of safety orders issued by the Industrial Accident Commission.

The well-recognized difficulty¹⁴ of framing a definition of "serious and wilful misconduct" has arisen from a confusion of thought regarding the essential nature of wilfulness and negligence, a confusion which has resulted in a conflict of decisions, some looking upon wilful misconduct as very similar to negligence,¹⁵ others regarding wilfulness as something quite apart and distinct from negligence.¹⁶ The same conflict is found in cases which have not arisen under workmen's compensation acts.¹⁷ Since workmen's compensation acts are especially designed to deprive the employer of the defence of contributory negligence¹⁸ it would be strange indeed if the defense left to him by the acts allowed him to escape liability by establishing negligence disguised as "wilful misconduct."

¹⁰ Ky. Acts 1916, ch. 33, p. 354 § 3; Md., and West Va., supra, n. 9.

¹¹ Mass., Acts of 1911, ch. 751 as amended.

¹² *In re Burns* (1914) 218 Mass. 8, 105 N. E. 601; *Boston and M. R. R. v. Oceanic Steam Navigation Co.* (1917) 226 Mass. 509, 116 N. E. 260; *Beckle's Case* (1918) 230 Mass. 272, 119 N. E. 653; *Riley v. Standard Acc. Ins. Co.* (1917) 227 Mass. 55, 116 N. E. 259; *In re Nickerson* (1914) 218 Mass. 158, 105 N. E. 604.

¹³ Supra n. 5.

¹⁴ *North Pacific Steamship Co. v. Ind. Acc. Com.*, supra n. 5; *Johnson v. Marshall Sons & Co.* [1906] A. C. 409, 5 Ann. Cas. 630.

¹⁵ *Helme v. Great Western Milling Co.*, supra n. 8; *Schmidt v. Purcell*, supra n. 8.

¹⁶ *U. S. Fidelity and Guarantee Co. v. Ind. Acc. Com.*, supra n. 5; *Beckle's Case*, supra n. 12; *In re Nickerson*, supra n. 12; *Haskell and Barker Car Co. v. Kay* (1918) 119 N. E. 811 (Ind. App.); *In re Burns*, supra, n. 12; *Great Western Power Co. v. Pillsbury*, supra n. 5.

¹⁷ The following cases recognize the distinction: *Louisville etc. Ry. Co. v. Bryan* (1886) 107 Ind. 51, 7 N. E. 807; *Holwerson v. St. Louis and S. Ry. Co.* (1900) 157 Mo. 216, 57 S. W. 770; *Archibald v. Ott* (1916) 77 W. Va. 448, 87 S. E. 791, L. R. A. 1916D 1013; *Sharkey v. Skilton* (1910) 83 Conn. 503, 77 Atl. 950. The following cases fail to distinguish between negligence and wilfulness: *Kramm v. Stockton Electric Ry. Co.* (1906) 3 Cal. App. 606, 86 Pac. 738; *Alger, Smith & Co. v. Duluth-Superior Traction Co.* (1904) 93 Minn. 314, 101 N. W. 298; *Birmingham R. R. & Electric Co. v. Bowers* (1895) 110 Ala. 328.

¹⁸ 1 Honnold on Workmen's Compensation, p. 16, § 4.

Some cases consider intent as the essential requisite for wilfulness.¹⁹ On the other hand, there are cases, one of which is the principal case, which indicate that knowledge of the likelihood of danger is essential.²⁰ No court has yet really given a convincing answer to the fundamental questions: "What is wilful misconduct: does it differ from negligence in degree or in kind?"

The interpretation of the word "serious" is a superadded difficulty. *Johnson v. Marshall Sons & Company*²¹ is one of the few cases in which an explanation of the term has been attempted. There it was said that "where the risk of loss or injury resulting to any person or thing from the doing of any particular act is very remote, or where that loss or injury, even if probable, would be trivial in its nature and character, the doing of that act, however wilful, would not amount to "serious misconduct." And yet this definition seems scarcely complete, for it would tend to exclude cases where an employee acts on sudden impulse.

Disobedience of rules, regulations, safety orders and the like may, but does not necessarily, constitute "serious and wilful misconduct."²² At least two California cases²³ involving violation of orders intended for the protection of workmen adopt what might be called the "sudden impulse" doctrine. In each of these cases the employee was exonerated because he was "confronted with a sudden and unexpected situation furnishing almost irresistible occasion for impulsive action."²⁴ His conduct was not looked upon as wilful. There is obviously no room for the application of this doctrine in the employer's favor when he violates safety orders issued by a superior authority.

While the principal case does nothing toward clearing up the confusion which exists in fundamental definition, as has been pointed out, both as regards the distinction between "wilful" and "negligent" and as regards the essential nature of wilfulness, it marks a step in the development of the law. What is most needed, however, is a clarification of fundamentals.²⁵ C. M.

¹⁹ *In re Burns*, supra n. 12; *Haskell and Barker Car Co. v. Kay*, supra n. 16.

²⁰ *Great Western Power Co. v. Pillsbury*, supra n. 5; *Gray v. Ind. Acc. Com.*, supra n. 5; *Western Pac. R. R. Co. v. Ind. Acc. Com.*, supra n. 5.

²¹ *Supra* n. 14.

²² Note L. R. A. 1917D 133 and cases there cited. The cases cited supra n. 5 involve disobedience of rules.

²³ *Hyman Bros. Box etc. Co. v. Ind. Acc. Com.*, supra n. 5; *Western Pacific R. R. Co. v. Ind. Acc. Com.* supra n. 5.

²⁴ *Hyman Bros. Box Co. v. Ind. Acc. Com.*, supra n. 5.

²⁵ For a general discussion of the whole subject see: "The Defence of 'Serious and Wilful Misconduct' under Workmen's Compensation Laws," C. P. Berry, 78 *Central Law Journal* 436.